Supreme Court, U.S.
FILED
06-203 APR 6 - 2006
OFFICE OF THE CLERK

No. 05-312

In The

Supreme Court of the United States

SUSANNE ATANUS,

Petitioner,

vs.

MERIT SYSTEM PROTECTION BOARD,

Respondent,

and

GENERAL SERVICES ADMINISTRATION,

Intervenor.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Federal Governmental Employee is prevented, under 5 USC: §7121(e)(1) from withdrawing a request for a grievance proceeding and filing a timely appeal with the Merit System Protection Board (MSPB) when the employee is misinformed as to whether a Union will represent her, the revocation is prompt and the proceedings have not yet begun.

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I. PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Susanne Atanus respectfully requests that this Court issue a writ of certiorari to review the judgment of the United State Court of Appeals for the Federal Circuit in this case. The Court of Appeals opinion is found at 434 F.3d 1324 (Fed. Cir. 2006). App:1.

II. OPINIONS BELOW

Susanne Atanus (hereafter "Atanus") brought an action challenging the removal from her position as a Procurement Analyst, GS-1102-11, with General Services Administration, and filed an appeal with the Merit System Protection Board (hereafter "MSPB"). General Services Administration (hereafter "Agency") filed a request for consideration of their motion to dismiss on the grounds that Atanus elected to pursue a negotiated appeals process; as opposed to the statutory appeals process. Therefore, the Agency claimed that Atanus was barred from electing the statutory appeals process because she previously elected the negotiated appeals process.

However, Atanus asserted that the Agency misled Atanus when they informed her that the union would represent and assist her through the grievance process; and it was only after Atanus elected the negotiated grievance appeals process, that Atanus was told that she would not be represented throughout the grievance appeals process. Consequently, Atanus opted to pursue the statutory appeals process after realizing she would not be assisted or represented.

On January 26, 2004, the MSPB entered its initial decision granting the Agency's motion to dismiss, pursuant to 5 U.S.C.A §7121(e)(1) on the grounds that Atanus' election to grieve her decision forever waived the possibility to elect a statutory appeals process. However, the Board informed Atanus of her right to Petition for Board Review of this initial decision under 5 C.F.R. §1201.5(f). App: 16. Atanus filed a timely petition for Board Review on March 2, 2004, and on January 27, 2005, the Board denied this petition. App: 13. The Board informed Atanus of her right to request the United States Court of Appeals for the Federal Circuit to review this final decision under 5 U.S.C. §7703. On March 14, 2005, Atanus petitioned the United States Court of Appeals for the Federal Circuit for review of the Board's final decision. On January 6, 2006 The United States Court of Appeals for the Federal Circuit issued its opinion. App: 1.

III. JURISDICTION

The Merit System Protection Board had jurisdiction pursuant to 5 C.F.R. §731.501. The Merit Systems Protection Board had appellate jurisdiction over this cause pursuant to 5 C.F.R. §1201.3(a)(7). The United States Court of Appeals had jurisdiction over this appeal pursuant to 28 U.S.C. §1295(a)(9). The Federal Circuit's decision was entered on January 6, 2006. This Petition is timely filed. This Court has Jurisdiction pursuant to 28 U.S.C. §1254(1).

IV. STATUTES INVOLVED

Section 7121 of Title 5 of the United States Code is set forth in its entirety, beginning at App: 37. Both sections 4303 and 7512 of this title are set forth in their entirety, beginning at App: 25 and App: 28, respectively. Section 7701 of this title is set forth in its entirety, beginning at App: 29.

V. STATEMENT OF THE CASE

A. FACTS REGARDING THE GRIEVANCE WITHDRAWAL AT ISSUE IN THE MSPB APPEAL.

The majority of the underlying facts of this case are not in dispute. General Services Administration (hereafter "Agency") employed Ms. Susanne Atanus (hereafter "Atanus") beginning September 16, 1984. On July 1, 2003, the Agency notified Atanus in writing of her removal from her position as a Procurement Analyst, GS-1102-11 with the Agency's Federal Supply Service, Contract Management Division, Contract Administration Branch, in Chicago Illinois. The effective date of the removal was July 7, 2003. Atanus was removed due to allegations of disorderly conduct and a failure to follow authorized instructions.

On July 1, 2003 the Agency sent Atanus letter informing her that she may appeal/grieve the Agency's decision by either asking the National Federation of Federal Employees (hereafter "NFFE") to assist her or, in the alternative, by appealing to the Merit System Protection Board (hereafter "MSPB"), but not both. The letter further

stated: "Under the terms of the GSA/NFFE National Agreement, you may be represented and assisted by the union in exercising any of your grievance rights." They told her they would assist her, as required by law.

Between July 7, 2003 and July 22, 2003, Atanus was in contact via telephone with NFFE's union representative, Jim Reynolds. Mr. Reynolds advised Atanus that NFFE would assist her in her grievance procedure but denied Atanus's request for a copy of the Collective Bargaining Agreement (otherwise referred to as the National Agreement between GSA and NFFE). Based on NFFE's advice, Atanus elected to grieve her removal via NFFE.

On July 22, 2003 Atanus sent a letter to Richard Smith, Director, Contact Management Division, of General Services Administration (hereafter "Smith") stating her desire to grieve the removal under the National Agreement and that she requested representation and assistance from NFFE. On July 24, 2003, Atanus sent another letter to Smith indicating her desire to have a union representative represent her during arbitration. However, within three days of her election and letter, NFFE notified Atanus that they would not represent her throughout the grievance procedure and that Atanus should acquire legal counsel. To fully protest her removal, Atanus immediately rescinded her grievance and filed a timely appeal with the MSPB.

B. PROCEEDINGS IN THE MERIT SYSTEM PROTECTION BOARD.

Atanus filed a timely appeal with the MSPB on July 26, 2003. After settlement negotiations proved

unsuccessful, Respondent filed a Motion to Reconsider its previously filed Motion to Dismiss, arguing that Atanus made a binding election when she informed Smith that she wished to grieve her removal via NFFE, thereby rendering any appeal by Atanus moot. App 10. On January 26, 2004, Administrative Law Judge Cooper (hereafter "ALJ Cooper") granted Respondent's Motion to Dismiss. ALJ Cooper reasoned that Petitioner made an irrevocable election and that case law only supported overturning her election if Atanus had been mislead by the Respondent. ALJ Cooper reasoned that there was no case law supporting overturning a remedy election if NFFE mislead a grieving employee. Further, ALC Cooper reasoned that, even if Petitioner had been mislead by her representative, her case must be dismissed because "...appellants remain personally responsible for the diligent prosecution of their appeals even if they are represented."

On March 2, 2004, Atanus filed a Petition for Review with the MSPB pursuant to 5 C.F.R. §1201.115. The Petition for Review was denied on January 27, 2005, thereby making the Initial Decision final. App: 13. However, MSPB did apprise Atanus of her right to request the United States Court of Appeals for the Federal Circuit to review the MSPB's final decision.

C. PROCEEDINGS IN THE FEDERAL CIRCUIT.

On March 14, 2005 Atanus filed a Petition for Review to the United States Court of Appeals for the Federal Circuit. App: 1. On January 6, 2006, the appellate court ruled on the merits of the case. In its opinion affirming the MSPB, the Federal Circuit held, as a matter

of law, that the Agency fulfilled 5 U.S.C.A §7121(e)(1)'s statutory criteria that the Agency must inform Atanus of her options to grieve/appeal the Agency's decision to remove Atanus. The Court reasoned that because the Agency informed Atanus that she could only choose one option, Atanus was not allowed to change election after discovering that a union representative was unwilling to represent her in grievance, regardless of timing of attempted change and regardless of prejudice.

Circuit Judge Newman dissented and found that the majorities ruling was against the clear legislative intent of 5 U.S.C.A §7121(e)(1). Judge Newman explained that where there is no evidence of prejudice, the appeal is timely filed, and the employee cannot seek to grieve the decision after a determination that she may not appeal leaves the employee without a process of redress.

VI. REASONS FOR GRANTING THE WRIT

A. SUMMARY OF REASONS FOR GRANTING WRIT.

The Federal Circuit Court of Appeals ruled that federal employees, who have been misinformed by any party other than the employer, have not been misinformed under 5 U.S.C. §7121(e)(1). This places federal employees in the position of having to ignore any advice given by the employee's union.

The Civil Service System was put in place to maximize the efficiency in settling adverse employment actions taken against federal employees. 5 U.S.C.

§71212(e)(1) was enacted to prevent employees from attempting to exhaust both the grievance option and the appeals process option. However, the statute remains silent regarding a modicum of accommodations for mistakes, misinformation, or change of heart. Case law has created one exception regarding elections by requiring the employer to properly inform the employee of their available options, and if they do not, the employee may proceed with their second election.

The potential effect of limiting the exception to situations where the employer fails to inform the employee of their available options is enormous. Interested third parties, such as unions, can also misinform the employee, yet when such is the case, the employee is prohibited from changing their election. The Federal Circuit found a distinction based upon the source of the misinformation as a means of saying that Atanus was fully informed. However, this does not address whether the employee was truly misinformed. Atanus was grossly misinformed, and set up. Unions are prevalent throughout federal employment and there is a strong likelihood that unions can and will misinform employees in the future. The ruling places the employee in the position of accepting the fact that they have been misinformed, through no fault of their own, and having to remain with a process that does not effectively adjudicate their rights.

The Federal Circuit's determination that an employee may not change their election if they are misinformed, the proceedings have not begun, and the appeal is timely filed is incorrect. Nothing in the statute requires this result. There will not be a wave of three day election changes, as the Federal Circuit fears. Like judicial

proceedings, in which a plaintiff may withdraw their complaint before a response, and file elsewhere, allowing this option for federal employees will not lead to a flood of election changes. Further, in the event the employee withdraws the grievance, and files a timely appeal with the MSPB, they cannot continue with the grievance or seek the appeal because the Federal Circuit is of the opinion that the statute leaves the employee with no option. This is patently unfair.

B. THE STATUTORY FRAMEWORK- 5 U.S.C.A. §7121(e)(1).

§7121(e)(1) was adopted in reaction to perceived abuses in selecting available procedural avenues, §7121 of Title 5 of the United States Code was enacted to prevent an employee from taking one appellate path and then, if exhausted, pursue the other. Section 7121(e)(1) authorizes an employee to either choose the grievance procedure or an appeal to the MSPB, "but not both." Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. The drafters intended to change the Civil Service System by adding the Merit System Protection Board, along with the avenue of pursuing a grievance route because:

> A widely held impression is that a government employee cannot be fired, regardless of unacceptable conduct or work performance. Although this is untrue enough bad examples are

> available to give it credibility. But, while it is technically possible to fire unsatisfactory employees, appeals processes are so lengthy and complicated that managers often avoid taking disciplinary action.

S.Rep. No. 95-969, 95th Cong., 2nd Sess. 1978, 1978 WL 8636, at 2731.

> The lengthy and complex appeals processes adversely affect employees and managers alike. The procedures are so confusing they often discourage the proper exercise of employee rights.

S.Rep. No. 95-969, 95th Cong., 2nd Sess. 1978, 1978 WL 8636, at 2732.

Thus, Congress created the Merit System Protection Board, and gave federal employees the right to unionize, while simultaneously giving the adversely affected employee the ability to grieve through their respective union, or to proceed through the MSPB. The main thrust behind the legislative intent of the statute was to achieve efficiency. However, the statute interestingly remains silent regarding the prohibition of a modicum of accommodation for mistakes, misinformation, or change of heart, in the administration of "the discretion of the aggrieved employee." As a result of the statutes silence, a federal employee may satisfy every objective intended by Congress, but still be denied the ability to appeal to the MSPB, since the employee is without a modicum of accommodation.

C. FOR PURPOSES OF §7121(e)(1), A MODICUM OF ACCOMMODATION IS REQUIRED IN ORDER TO PREVENT UNJUST RESULTS.

1. Defining 5 U.S.C.A §7121(e)(1) To Allow An Exception For Misinformed Employees Is Consistent With The Intent Of The Statute.

The Federal Circuit's failure to grant the MSPB jurisdiction puts form over substance because the words of the statute are broad enough to include the Atanus's circumstances yet still conform to the intent of the statute. Although there have been no prior cases where a *union* misled an employee into making a binding decision, there have, however been several cases brought before the MSPB where a Respondent misled an employee by not informing them of their remedial options; and as a result the employee's second election was upheld as valid. See *Battle v. Department of Labor*, 29 M.S.P.R. 15 (1985); *Miyai v. Department of Transportation*, 32 M.S.P.R. 15 (1986); *Blanshan v. Department of Airforce*, 23 M.S.P.R. 84 (1984). In each of the aforementioned cases, the MSPB held that, due to misrepresentations by the Respondents, the initial election was considered non-binding and the respective employee's appeal to the MSPB was therefore valid, although the statute remained silent regarding the agency's responsibility to properly inform the employee of their available options.

Accordingly, judicial intervention has been considered legitimate in narrow circumstances when the

agency has not properly informed the employee of their available options in challenging the basis of their removal.

In one blanket statement the Federal Circuit cites *Rodriguez v. Merit System Prot. Bd.*, by saying, "[O]nce a timely filing is made to pursue a path, the other is forever waived." 804 F.2d 673, 675 (Fed. Cir. 1986). However, despite what is seemingly a clear cut rule, the Federal Circuit specifically pointed out an exception that applies to those who are not properly informed by their employers, "...that in order to comply with the statute, the Agency must properly inform an employee of her choices." *Johnson v. U.S. Department of Labor*, 26 M.S.P.R. 447, 450 (1985). Although this exception does not apply to Atanus, it does illustrate how differing circumstances can alter the long-standing rule that once you pursue a path, the other is forever barred. If there is a recognized exception to the rule for employers not properly informing an employee, then similarly, the union's misleading statements misinformed Atanus to such an extent that the exception should be broadened to include this and like circumstances.

The exception the Federal Circuit point to was adopted in order to ensure that employees are properly informed, not to simply ensure that the Agency complies with the statute. Although the statute is silent regarding whether an employee who was misled by their union qualifies for the exception, public policy would support allowing an innocent employee the opportunity for redress when she is clearly not "properly inform[ed]."

2. The Federal Circuit's Narrow Reading Of The Election Exception Fails To Address Whether The Employee Was Truly Misinformed.

In determining whether the exception should be extended to truly misinformed employees, the Federal Circuit failed to consider the burden placed on the employee if they cannot rely on the advice of their respective union. The earliest case where an employee was able to change their election was *Blanshan v. Department of Airforce*, 23 M.S.P.R. 84 (1984)

In *Blanshan*, the MSPB allowed the Appellant's prior election to be withdrawn. *Blanshan* alleged that the Agency failed to inform Blanshan that he had the right to file a grievance under the Collective Bargaining Agreement or appeal to the Board. Erroneously believing that his only option was to grieve, Blanshan elected the grievance procedure. After making his election, however, Blanshan learned that he could pursue either option. Blanshan then chose to appeal to the MSPB, rather than continue with the grievance procedure. The MSPB held that, "since appellant was reasonably misled by the Agency's erroneous advice, his filing of the grievance did not serve as an election under 5 U.S.C. §7121(d), and the MSPB did have jurisdiction over the appeal." *Blanshan*, 23 M.S.P.R. at 86.

The Federal Circuit distinguished this exception by holding that, because the *Union* misrepresented, and not the Agency, Atanus was properly informed and therefore could not appeal to the MSPB. This distinction is superficial because it only distinguishes between the sources of the

misinformation. In essence, the decision simply refuses to consider whether the employee was able to make an informed decision. Further, the initial decision of the MSPB, adopted by the Federal Circuit, maintains that, "even if the union decided not to represent Atanus, it was Atanus' responsibility to determine whether the union would represent her before electing the grievance procedure." This inevitably tells every employee that they may not rely on the advice given to them by their union representative and instead, they should seek advice regarding union representation from a source outside the union itself. The union's statement that they would represent her through the grievance procedure leads to the inescapable conclusion that she was misinformed.

Thus, the statute should accomplish the efficiency objectives given by the legislature while still protecting the employee by ensuring that they be allowed to change an election if they can show they have not been properly informed. To stop protecting the employee whenever the agency fulfills its duty places the employee in an impossible position of not being able to rely on the assertions of interested third parties.

3. Interpreting The Language In §7121(e)(1) So Narrowly Trammels On The Rights Of The Aggrieved And Leaves Them Without Due Process Of Law.

Following the Federal Circuit's reasoning, if an employee is misinformed by their union, and withdraws their election to grieve, in favor of appealing to the MSPB, the employee is forever deprived of any option for redress. This, as Judge Newman's Dissent suggests, is the "absurd

result" described by the Court in *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). It is unreasonable to believe that the legislator intended this result.

The purpose behind changing the Civil Service System was to help employers and employees alike through the complex appeals process of disciplinary proceedings. The Legislature's goal aimed at efficiency and allowing all parties involved to understand and challenge and defend adverse employment decisions. No legitimate purpose is served when an employee loses all rights to challenge the basis of their removal from employment. At the very least the employee should be given the opportunity to proceed with the original election. Anything less would punish the employee for innocently withdrawing an election to grieve under the impression that they were misinformed as to their available options.

D. THE FEDERAL CIRCUIT'S DECISION OVERESTIMATES THE FEAR OF A SLIPPERY SLOPE DEVELOPING IF EMPLOYEE'S ARE ALLOWED TO CHANGE THEIR ELECTION UNDER THE NARROW CIRCUMSTANCES DESCRIBED ABOVE.

The Federal Circuit determined that the Board did not err in applying the statute. Following a strict interpretation of the statute, the Federal Circuit found that Atanus lost her Board appeal right by electing to pursue the grievance, and then lost her grievance right by withdrawing her grievance. The Federal Circuit reasoned that, if it took account of lack of prejudice, length of time between election and withdrawal or election, and whether the union

misinformed the employee it would be creating "...a slippery slope not for the court of appeals interpreting statutes."

There is no reason for such a harsh result. The statute only requires the employee to elect either grievance or appeal, but it does not prohibit a prompt change, at least upon new information, during the period of election. The lack of a slippery slope developing is evidenced by a comparison with the rigorous standards of judicial proceedings. In judicial proceedings, a plaintiff may withdraw a complaint before response, without prejudice to refilling elsewhere. As such, an employee should be able to change her election when, within three days, she was told that the union would not represent her, the proceeding had not begun, and the time for filing the MSPB appeal had not expired.

The fact remains that when an employee suffers an adverse action, a more fair result would be reached if an employee were given the option of resuming her grievance proceedings if the MSPB finds they have no jurisdiction to hear the appeal. Surely, the statute does not require that if an employee changes their election, they will be barred from both paths.

VII. CONCLUSION

The Court should grant a writ of certiorari to the United States Court of Appeals for the Federal Circuit to resolve the issue of whether withdrawing a request for a grievance proceeding and filing a timely appeal with the Merit System Protection Board (MSPB) when an employee

is misinformed as to whether a Union will represent her is consistent with 5 U.S.C.A §7121(e)(1).

RESPECTFULLY SUBMITTED this 8th day of August 2006.

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL
CIRCUIT

SUSANNE ATANUS,

Petitioner,

v.

MERIT SYSTEM
PROTECTION BOARD,

Respondent,
and

GENERAL SERVICES
ADMINISTRATION,

Intervenor.

No. 05-3123
D.C. No.
CH-0752-03-0703-I-1

Appeal from the Merit System Protection Board
Neil A. G. McPhie, Chairman

Argued and Submitted
June 30, 2005

Filed July 1, 2005

Before: Pauline Newman, Alan D. Lourie,
and Alvin A. Schall, Circuit Judges.

Opinion by Judge Lourie

Dissent by Judge Newman

COUNSEL

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OPINION

LOURIE, Circuit Judge:

Susanne Atanus ("Atanus") petitions for review of the final decision of the Merit Systems Protection Board ("Board") dismissing her appeal for lack of jurisdiction. *Atanus v. Gen. Serv. Admin.*, No. CH-0752-03-0703-I-1 (M.S.P.B. Jan.26, 2004) (*"Decision"*). Because Atanus elected to grieve her removal, the Board was correct in holding that she had no right of appeal. We therefore affirm.

I. BACKGROUND

On July 1, 2003, Atanus received a notice of removal from her position of Procurement Analyst due to disorderly conduct charges and failure to follow authorized Instructions. *Decision,* slip op. at 2. The removal letter stated that Atanus could challenge her removal either by filing a grievance or by appealing to the Board, but not both. As far as pursuing a grievance was concerned, the letter stated: "Under the terms of the GSA/NFFE National Agreement, you may be represented and assisted by the union in exercising any of your grievance rights." On July 22, 2003, Atanus sent a letter to the deciding official, Richard Smith, stating that she wished to grieve her removal and asked to be assisted and represented by the union in the grievance procedure. *Id.* Two days later, she sent a second letter confirming her election of the grievance procedure, expressing her desire to proceed to arbitration, and designating a representative. On July 26, 2003, Atanus sent a third letter withdrawing her grievance. That same day she filed an appeal to the Board. *Id.*

The General Services Administration ("GSA") filed a motion to dismiss the appeal, arguing that Atanus waived her

right to appeal to the Board when she elected to grieve her removal in her first letter. Atanus responded that her election of the grievance procedure was not an Informed election because she was misled by her union representative. Atanus claimed that before she elected to grieve her removal, a representative told her that the union would assist her, and that she made her decision to grieve based on the assumption that she would be represented by the union throughout the entire grievance process. After she made the election, however, Atanus alleged, the representative told her that the union was no longer willing to represent her. Based on this information and believing that she would not be represented, Atanus withdrew her grievance and appealed to the Board.

The Administrative Judge ("AJ") granted the GSA's motion to dismiss, stating that Atanus was barred by U.S.C. §7121(e)(1), from appealing her action to the Board because she had first filed a grievance. The AJ concluded that once Atanus made a knowing and binding election to grieve her removal, she waived her right to appeal to the Board.

The AJ noted that there is an exception to this waiver where the agency falls to inform the employee of her options. However, the AJ determined that the exception did not apply in this case because the agency properly informed Atanus in its removal letter that she could either appeal to the Board or file a grievance. The AJ rejected Atanus's argument that her decision was not an informed one due to alleged misrepresentations by the representative because there was nothing in the record to support her statements. Furthermore, the AJ noted, Atanus did not claim that the union refused to file a grievance on her behalf, but rather alleged that the union told her that, at some point, they would stop representing her. Finally, the AJ found that even if it were assumed that Atanus

was misled by her representative, the case would still have to be dismissed because Atanus remained personally responsible for the diligent prosecution of her grievance.

Atanus petitioned for review by the full Board, which denied her petition in January 2005, making the initial decision of the AJ final. *See* C.F.R. §1201.113. Atanus then timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. §1295(a)(9).

II. DISCUSSION

The scope of our review in an appeal from a decision of the Board is limited. We must affirm the Board's decision unless it was: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2000); *see Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1311 (Fed.Cir.2003). Whether the Board has jurisdiction to adjudicate an appeal is a question of law that we review *de novo. See Campion v. Merit Sys. Prot. Bd.*, 326 F.3d 1210, 1213 (Fed.Cir.2003).

On appeal, Atanus contends that the removal letter was misleading and incomplete because it failed to inform her that she needed to inquire whether the union would represent her before electing to grieve her removal. Furthermore, the letter stated that under the terms of the National Agreement between GSA and the National Federation of Federal Employees, Atanus "may be represented and assisted by the union" during the grievance procedure. Atanus understood that language to mean that if the union assisted her, it would also represent her during the entire grievance process. Moreover, according to

Atanus, the union representative further misled her by stating that he would "assist" her in the grievance procedure and later deciding not to represent her.

The Board responds that GSA expressly notified Atanus of her options in the removal letter, which is all that is required of the agency. According to the Board, the union's actions do not implicate the agency. Furthermore, the Board argues, the union did not mislead Atanus because the union indicated that it would "assist" her, and "assist" does not mean "represent." Finally, even if the union decided it would not represent Atanus, it was Atanus's responsibility to determine whether the union would represent her before electing the grievance procedure.

We conclude that the Board properly decided that it did not have jurisdiction over Atanus's appeal because she made an informed decision to grieve her removal, thereby waiving her right to appeal to the Board. Under 5 U.S.C. § 7121(e)(1), an aggrieved employee may raise his or her grievance by timely filing a written grievance under the negotiated grievance procedure or by filing a notice of appeal under the applicable appellate procedures, "but not both":

Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both.

5 U.S.C. §7121(e)(1). "[O]nce a timely filing is made to pursue a path, the other is forever waived." *Rodriguez v. Merit Sys. Prot. Bd.,* 804 F.2d 673, 675 (Fed.Cir.1986). In

order to comply with the statute, the agency must properly inform an employee of her choices. *See Johnson v. U.S.* Dept *of Labor,* 26 M.S.P.R. 447, 450(1985).

In this case, the agency expressly informed Atanus in its removal letter that she had the option to pursue a grievance procedure or appeal to the Board, but not both. Although Atanus alleges that her election was not properly informed, that is not correct. While a few Board decisions have held that an election of a grievance was not binding, in such cases the Board found that the employee's decision was not fully informed because the agency had only notified the employee of one available avenue of recourse when others were available. *See Johnson v. U.S. Dept of Labor,* 26 M.S.P.R. at 450; *Miyai v. Dept of Transp.,* 32 M.S.P.R. 15 (1986); *Blanshan v. Dep of* the *Air Force* 23 M.S.P.R. 84 (1984). That is not the case here. The agency clearly notified Atanus in her letter of both options and that she could only pursue one option. Atanus also contends that her election was uninformed because the letter did not completely notify her of the scope of her union representation and the union representative misled her. However, these are allegations of union misconduct, and are not the fault of the agency. Moreover, there is nothing in the record from which to ascertain what the union representative may or may not have told Atanus. Thus, we can only evaluate Atanus's undisputed actions, which are that she opted for the grievance procedure having been previously told by the agency that grieving would preclude an appeal.

Atanus clearly elected to pursue the grievance procedure. Although she later changed her mind, Irrespective of the reason, as long as the agency clearly expressed to Atanus that she had two options, and that one would exclude the other,

and Atanus exercised one option, Atanus is precluded from withdrawing her option to pursue the other. It was Incumbent upon Atanus to Inquire into the extent of the union's assistance before making a binding election. Atanus also contends that the AJ was prejudiced and biased towards her during a'settlement conference between the parties by stating that she should settle or face dismissal of her claims. There is nothing In the record, however, to support this other than Atanus's statement. Even accepting the statement as true, it does not establish that the judge had a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Dept of the Army,* 287 F.3d 1358, 1362 (Fed.Cir.2002).

The dissent emphasizes the short time period between Atanus's election of a grievance and its withdrawal, suggesting lack of prejudice to the agency. Were we empowered to sit as a court of equity, taking into account the difficulties of employee decision-making, and deciding where the merits lie, we might agree. But we are not; it is our task to determine whether the Board erred in applying a statute, not to amend the statute to take account of lack of prejudice, length of time between election and withdrawal of election, etc. That is a slippery slope not for courts of appeals interpreting statutes.

Unfortunately, Atanus lost her Board appeal right by electing to pursue a grievance, and then lost her grievance right by withdrawing her grievance. As we are bound by the statute, which holds that an employee may either file a grievance or appeal to the Board, but not both, and Atanus elected a grievance, she has no right of appeal to the Board.

III. COSTS

No costs.

AFFIRMED.

DISSENT

PAULINE NEWMAN, Circuit Judge, dissenting.

My colleagues hold that an employee cannot change her election of the grievance procedure after three days, although the grievance proceedings had not yet begun; indeed, no proceeding had been initiated. Ms. Atanus learned, after she chose the grievance path, that the union would not provide representation throughout the procedure. On receiving this information, she promptly withdrew her request for a grievance proceeding, and filed a timely appeal with the MSPB. My colleagues hold that the statute prohibits such a change. Although the statute is silent, my colleagues hold that the initial election is final and irrevocable, no matter how prompt the revocation, no matter what the circumstances.

There is no allegation of prejudice to the agency, to the union, to the MSPB, or to anyone else. No deadline had passed; her appeal to the MSPB was timely. The statute does not prohibit a modicum of accommodation for mistakes, misinformation, or change of heart, in administration of "the discretion of the aggrieved employee." The statute, 5 U.S.C. §7121(e)(1), authorizes the employee to choose either the grievance procedure or an appeal to the MSPB "but not both":

(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of

section 7701 of this title or under the negotiated grievance procedure, but not both.

5 U.S.C. §7121(e)(1). The purpose is to prevent an employee from taking one appellate path and then, if unsuccessful, trying the other. Ms. Atanus elected the grievance procedure on Tuesday, July 22, 2003, designating the union as her representative. She was then Informed by the union that It would not assist her "in the entire grievance procedure and that I should acquire a lawyer." Ms. Atanus withdrew the grievance request on Saturday, July 26, 2003, and filed a timely appeal with the MSPB.

Neither statute nor precedent prohibits such action. I have found no case where the employee was prohibited from changing the election during the initial period set for choosing the path of review. As the panel majority acknowledges, several Board decisions have held that the initial choice could be changed. When the issue reached the Federal Circuit in *Whitaker v. MSPB,* 784 F.2d 1109 (Fed.Cir.1986), the petitioner sought to change his election after he was well into the grievance process, thus having implemented his choice. In *Rodriguez v. MSPB,* 804 F.2d 673 (Fed.Cir.1986), cited by the panel majority, Mr. Rodriguez elected the grievance procedure and prosecuted the grievance through the first two steps; he then was untimely for the third phase, whereupon the arbitrator dismissed the grievance. Rodriguez then attempted to appeal to the MSPB, and asked the MSPB to waive its filing deadline. The court held that he could not start afresh with an appeal to the MSPB, upon having chosen the grievance path; and that since there was no discrimination claim the Board could not review the arbitrator's decision. These facts are quite different from those at bar, for Ms. Atanus did not prosecute the grievance even to the first step during the three

days before she withdrew the grievance, and the deadline for filing an appeal to the Board had not passed. The agency has not alleged any prejudice. The statute requires the employee to elect either grievance or appeal; but contrary to the majority's view of the statute, it does not prohibit a prompt change, at least upon new information, during the period of election.

Even applying to this administrative action the rigorous standards of judicial proceedings, a plaintiff may withdraw a complaint before response, without prejudice to refiling elsewhere. Ms. Atanus should have the right to change her election when, within three days, she was told that the expected representation would not be available throughout the proceeding. Nothing had begun, and the time for filing the MSPB appeal had not expired. The statute does not require prohibiting such a change of election. In law, as in life, there must be a bit of tolerance in the machinery, lest too tight a fit freeze the apparatus. As things stand, Ms. Atanus is now held bound by her withdrawal of the grievance path, but excluded from her substitution of the appeal path. The statute does not require this result. The resulting Inequity is unwarranted and unnecessary.

I doubt that this is a "slippery slope," in the majority's words, or that permitting a justified change of direction, as the MSPB has permitted in other cases, will lead to a wave of 3-day changes of election. It would, however, achieve a fairer result in this case, where Ms. Atanus has suffered an "adverse action" in deprivation of her livelihood--surely a serious matter--yet is met with the implacable judicial ruling that she had lost all right of review. If she is barred from the MSPB appeal because of her initial election of the grievance

procedure, then at a minimum, she should be allowed to proceed by grievance. Surely the statute does not require that an attempted change in election will bar both statutory paths. This is the "absurd result" described by the Court in *Holy Trinity Church v. United States*, 143 U.S. 457, 459,12 S.Ct. 511, 36 L.Ed. 226 (1892):

> It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of Its makers.... This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to Include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding Its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator Intended to Include the particular act.

Thus I must, respectfully, dissent.

UNITED STATES OF AMERICA
MERIT SYSTEM
PROTECTION
BOARD

SUSANNE ATANUS, Appellant, v. GENERAL SERVICES ADMINISTRATION, Agency.	DOCKET NUMBER CH-0752-03-0703-I-1 DATE: January 27, 2005

I. BEFORE

Neil A. G. McPhie, Chairman
Susanne T. Marshall, Member
Barbara J. Sapin, Member

II. FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The Board has not considered the appellant's reply to the agency's response to the petition for review because the appellant's reply, is not based on previously unavailable evidence. 5 C.F.R. § 1201.114(i). The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

III. NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. §7703). You may read this law as well as review the Board's regulations and other related material at our website, http:/www.mspb.gov.

FOR THE BOARD: /s/ Melissa O. Jorges for
Bentley M. Roberts, Jr.
Washington, D.C Clerk of the Board

UNITED STATES OF AMERICA
MERIT SYSTEM
PROTECTION
BOARD
CENTRAL REGIONAL OFFICE

SUSANNE ATANUS, Appellant, v. GENERAL SERVICES ADMINISTRATION, Agency.	DOCKET NUMBER CH-0752-03-0703-I-1 DATE: January 26, 2004

BEFORE
Scott D. Cooper
Administrative Judge

I. INITIAL DECISION

On July 26, 2003, Appellant was removed from her position as a Procurement Analyst, GS-1102-11 with the Agency's Federal Supply Service, Contract Management Division, Contract Administration Branch, in Chicago Illinois. On July 31, 2003, Appellant filed an appeal with the Board. On January 6, 2004, the Agency filed a motion to

dismiss.[1] On January 16, 2004, Appellant filed her timely reply to this motion. For the reasons set out below, the Agency's motion to dismiss is granted and this appeal is **DISMISSED**.

II. JURISDICTION

The facts noted below are not in dispute. On July 1, 2003, Appellant received notice of her removal from the federal service. Record at Tab 1. On July 22, 2003, Appellant sent a letter to the deciding official, Richard Smith, stating:

> I am grieving your decision to remove me from federal service and from my position as a Procurement Analyst, GS-1102-11 in your letter dated 7/1/03 effective 7/7/03. I am requesting to be represented and assisted by the union in exercising any of my grievance rights...

Record at Tab 7-2. On July 24, 2003, Appellant sent a second letter confirming her election of the grievance procedure and designating her representatives. *Id.* Appellant claims that, on July 25, 2003, the union informed her it would not represent her "during the

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[1] The Agency initially filed its motion on August 27, 2003. I informed the parties, at that time, that I was inclined to grant the Agency's motion. The agency asked me to hold my consideration of the motion in abeyance to allow for settlement discussions. The party engaged in extraordinary efforts to settle this case including mediation. The parties were not able to reach a settlement. On January 6, 2004, the Agency asked me to rule on their motion. The Agency informed me, however, that as of the date of this decision, its last settlement offer is still open.

entire grievance procedure[2] and that [she] was rescinding her earlier letters and appealing her removal to the Board.

Appellant is covered by a Collective Bargaining Agreement (CBA). Record at Tab 7-4aaa. Removal actions are grievable under the provisions of the CBA. Article 7, Section 6 of the CBA states:

> In those matters where statutory choice exists, the employee exercise that choice for the grievance procedure where the grievance is submitted in writing to the designated management official...

It is undisputed that Appellant filed a timely grievance in writing with the designated grievance official under the provisions of the CBA.[3] Record at Tab 19.

Under the provisions of 5 U.S.C.A. § 7121(e)(1):

> Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both... .

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[2] The record does not indicate in which parts of the grievance process the union stated it would not represent Appellant.

[3] Appellant had filed three other grievances with Mr. Smith in the past. Record at Tab 7-4gg and 4oo.

> An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedure or under the negotiated grievance procedure at such time the employee files a notice of appeal under the applicable appellant procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever comes first.

Thus, Appellant elected to proceed in the grievance procedure when she sent her grievance to Mr. Smith on July 22, 2003. Once a timely filing to pursue a grievance is made, the option to appeal that action before the Board is forever waived. *See Whitaker v. MSPB,* 784 F.2d 1109 (Fed. Cir. 1986). The fact that an employee changes her mind and wants to file with the Board after filing a grievance is of no consequence. *See Rodriguez v. Department of Justice,* 93 M.S.P.R. 66 (2002). If an employee appeals to the Board after filed a timely grievance under the CBA, the appeal must be dismissed. *See Gayler v. Department of the Air Force,* 8 M.S.P.R. 65, 67-8 (1981).

The only exception to the rule cited above is where the **Agency fails** to provide accurate information as to an employee's options. *See Johnson v. Department of Labor,* 26 M.S.P.R. 447, 450 (1985). In this case, however, it is undisputed that the Agency properly informed Appellant that she had

the option to either appeal to the Board or grieve with the Agency, but not both. Record at Tab 7-4b.

Appellant's counsel argues that Appellant's election of the grievance procedure was not an informed election since Appellant was mislead by her union representative. Nothing in Appellant's affidavit indicates that Appellant's representative made any misleading statements. Appellant claims her representative, Jim Reynolds, informed her "that the union would **assist** [her] in the grievance procedure." Record at Tab 19 (emphasis added). She asserts that, on July 25, Mr. Reynolds informed her that "the union was no longer willing to represent [her] and that she should acquire a lawyer." *Id.* These statements are not inconsistent. Appellant never asserted that Mr. Reynolds stated that the union would **represent** her, only that the union would **assist** her in the grievance procedure.

Appellant did not allege that Mr. Reynolds ever denied her any assistance in the grievance procedure. Contrary to Appellant's counsel's assertions, Appellant never claimed that the union refused to file a grievance. She merely stated that the union told her that, at some point in the procedure, they would stop representing her and that she would have to hire a lawyer. The CBA specifically allows employees to file grievances without the participation of the union. Thus, Appellant's counsel statement that Mr. Reynolds "closed" her option to file a grievance is untrue. Appellant's counsel's statement that Mr. Reynolds determined that the union would not grieve Appellant's removal is not supported by anything in the record.

Even if I were to assume that Appellant was misled by her representative, here case must be dismissed. The Board has long held that appellants remain personally responsible for the diligent prosecution of their appeals even if they are represented. *See Taylor v. U.S. Postal Service,* 53 M.S.P.R. 27, 28-9 (1992).

Appellant chose to proceed under the grievance procedure based on the union informing her that it would **assist** her in the grievance process. Nothing in the record indicates that Appellant ever asked the union if they would **represent** her in the grievance process. Nothing in the record indicates that the union ever told Appellant that they would represent her in the grievance process. Thus, I find that Appellant made a knowing and binding election to proceed in the grievance process. After her election, she found that, although she could proceed with the grievance, the union would not represent her for the **entire** process and she would have to be represented by an attorney for the remainder. Given the fact that Appellant elected the grievance procedure prior to filing this appeal, her appeal must be dismissed.

III. DECISION

The Appeal is DISMISSED.

FOR THE BOARD:

/s/ Scott D. Cooper
Scott D. Cooper
Administrative Judge

IV. NOTICE TO APPELLANT

This initial decision will become final on **March** 2, 2004, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

V. BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), or personal or commercial delivery. A petition for review may also be filed by electronic mail (e-mail) if the petitioning party makes an election under 5 C.F.R. § 1201.5(f), which requires a written statement of the election that includes the e-mail address at which the party

agrees to receive service. Such an election may be filed by e-mail at the following address: e-FilingHQ@mspb.gov.

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served you petition on the other party. If you filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

VI. JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be

received by the court no later than 60 calendar days after the date this initial decision becomes final.

VII. NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

5 U.S.C. § 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to--

(A) 30 days' advance written notice of the proposed action which identifies--

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which--

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under

subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee--

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee--

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is--

(1) a preference eligible;

(2) in the competitive service; or

(3) in the excepted service and covered by subchapter II of chapter 75,

and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701.

(f) This section does not apply to--

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

5 U.S.C. § 7512. Actions covered

This subchapter applies to--

(1) a removal;
(2) a suspension for more than 14 days;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;

but does not apply to--

(A) a suspension or removal under section 7532 of this title,
(B) a reduction-in-force action under section 3502 of this title,
(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,
(D) a reduction in grade or removal under section 4303 of this title, or
(E) an action initiated under section 1215 or 7521 of this title.

5 U.S.C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided

in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless--

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter

75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision--

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment--

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which--

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have

a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless--

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may--

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

5 U.S.C. §7121. Grievance Procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that--

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall

be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning--

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar

matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as

could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected--

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

Wherefore, Claimant prays

1. That the court reverse the decision of the United States Court of Appeals for the Federal Circuit and remand this case to the Merit System Protection Board to hear Ms. Atanus' timely appeal.
2. Such other and further relief as is just and appropriate

Dated this 7th day of August, 2006

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